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Supreme Court of the United States

OCTOBER TERM, 1959

No. 773

UNITED STATES OF AMERICA for the use and benefit of J. A. EDWARDS & CO., INC.,

Petitioner,

—against—

PETER REISS CONSTRUCTION CO., INC.,
THE TRAVELERS INDEMNITY COMPANY,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID MORGULAS,
Attorney for Respondents.

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Opinions Below

The opinion of the District Court is reported in 174 F. Supp. 264. The opinion of the U. S. Court of Appeals for the Second Circuit is reported in 273 F. 2d 880.

Jurisdiction

The jurisdiction of this Court is invoked by the Petitioner under the provisions of 28 U. S. C. § 1254.

Questions Presented

Petitioner would have it appear that important and unique questions of law are presented by the decision of the Court below. Such a claim on petitioner's part is, naturally, obligatory since otherwise there would not have been even a pretense for the filing of the petition. The facts of the instant case, however, render it *sui generis* as to the main and only real issue involved, and the two side issues with which petitioner has gratuitously padded his statement of "Questions Presented" are wholly without merit, one having already been disposed of by this Court and the other being entirely spurious.

In stating the "Questions Presented" to this Court at page 2 of its petition, the petitioner has improperly stated that the main issue here involved is whether the Miller Act requires different treatment where materialmen deliver goods under separate, independent orders than where they furnish goods pursuant to a single contract. In fact, the Court of Appeals stated at the very outset of its opinion:

> "We are not here required to decide whether, when a materialman makes deliveries under a series of purchase orders so that each delivery is within ninety days of its predecessor, a notice given within ninety days of the last order or delivery will relate back to include the entire chain."

The petitioner, in his effort to have this Court assume jurisdiction, has set up the proverbial straw man in the hope that this Court may find some conflict between the instant decision and that of the Court of

Appeals in *Noland Co.* v. *Allied Contractors,* 273 F. 2d 917. The fact is, however, that the case here presented is wholly and completely *sui generis* and one which finds no counterpart in any case decided thus far in any court.

What the Court below held in our case was that where an insignificant independent delivery amounting to about $15 was made more than four months after the last previous total of $10,000 of deliveries, the delivery of $15 could not revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval. In fact the Court below specifically stated that the question before it was not the same as in *Edwards* v. *Bregman,* 172 Fed. Supp. 517, upon which the Court of Appeals in the Fourth Circuit predicated its reversal in *Noland Co.* v. *Allied Contractors,* (supra). As the Court below said, "The question here is an easier one." The Court below specifically stated that under the peculiar facts of this case it would be clearly beyond any conceivable liberal construction of the Miller Act to hold that petitioner could revive its claim after it had concededly lapsed, since no notice was sent within the 90-day period, by an insignificant delivery made some time after the lapse of 90 days after all of the prior deliveries. This is all the Court below found, and perhaps it is best to state the question in the language of the opinion of the Court below, viz.:

> "We are not here required to decide whether when a materialman makes deliveries under a series of purchase orders so that each delivery is within 90 days of its predecessor, a notice given within 90 days of the last order or delivery will

> relate back to include the entire chain. * * * The question here is an easier one. In this case any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provisions of the Miller Act, as explained in our opinion in the Thompson case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval * * *."

Clearly, therefore, there is no question of conflict involved which would justify the petitioner's application.

Petitioner's other contention, that certain letters, originating not from the claimant but from a third party, were improperly excluded below, is wholly without merit. This exact question, i. e., whether notice by a subcontractor to the general contractor of the subcontractor's indebtedness to a materialman is sufficient notice *by the materialman*, under the Miller Act, was dealt with in the case of *Bowden* v. *United States*, 239 F. 2d 572, certiorari denied, 353

U. S. 957 (Dec. 31, 1956). The Court of Appeals had held in *Bowden* that the statutory requirement that notice be sent from the claimant to the general contractor was an absolute prerequisite to liability of the general contractor to the claimant under the Miller Act. On petition by the materialman to this Court, certiorari was denied.

Statement

The petition contains such a distorted statement of the facts and such a misconstruction of the opinion of the Court below and the alleged "applicable case-law" that we are compelled to go to considerable length in order that this Court may have a clear picture both of the special and peculiar circumstances of this case and the reaction of the Court of Appeals thereto.

On November 17, 1955 respondent Reiss, as general contractor, entered into a contract with the United States of America for the construction of a Nike site at Lido Beach, New York. In accordance with the Miller Act, Title 40 U. S. C. A. 270b, Reiss as principal and the respondent Travelers as surety furnished the required payment bond.

Under date of December 8, 1955, respondent Reiss entered into a written subcontract with the defaulting defendant Greene as a subcontractor for the performance of the electrical work required by the general contract. Greene thereafter, from time to time, ordered some of the electrical material from petitioner. Seven concededly independent deliveries, aggregating $10,850.37, were made between August 24, 1956 and

October 31, 1956. After that followed over four months of silence and all claim under the Miller Act was clearly ended. On March 5, 1957 petitioner delivered a switch billed at $15.90 and it is this item which petitioner claims *revived* his right of claim, theretofore concededly ended, to embrace every item ever delivered by him to Greene.

Reference must be made at this point to the statement made at page 5 of the petition that the District Court specifically stated that judgment would have been awarded to the petitioner if delivery of the $15 item had been proven. This same spurious and impossible contention was made by petitioner in the Court below. Desperate indeed must be the petitioner's plight to again raise that question before this Court. Never have we seen a question on appeal so misrepresented by a litigant as it has been on this specific point. Nothing was further from the question presented to the Courts below and it should never have been suggested in this Court. The fact is that there was never any question about the delivery of the $15 switch, for this delivery was expressly found by the trial Court on the respondent's request, being Finding of Fact No. 18. That was never a question for determination on appeal. Petitioner pounced upon a somewhat inartistic expression found in the trial Court's opinion that the $15 item could not be connected with the previous deliveries, as a basis for his argument that the District Court found it had not been delivered, when that Court's very finding clearly indicated that it was delivered and we at all times so conceded. We respectfully submit that it is an imposition on this Court to again urge this impossible argument. In fact, the so-called "concession" ex-

tracted from respondent's brief and quoted on page 9 of the petition was in answer to this argument. Suffice it to say that the Court of Appeals fully recognized the spuriousness of this argument and concerned itself with the one real issue in this case, i. e., whether a delivery of an isolated and insignificant item after a lapse of over four months could revive a dead claim. As if this were not enough, petitioner proceeds to compound its misstatements by a reference to *U. S. for use and benefit of J. A. Edwards & Co., Inc.* v. *Bregman Construction Corp.*, 172 F. Supp. 517, and a statement that the *Bregman* case involved the "same legal principles" as this case. This is simply not so and the very opinion of the Court of Appeals so states. In *Bregman*, each delivery involved was well within 90 days of the one preceding it and, therefore, there was at no time a gap of over 90 days between successive deliveries.

The reversal in *Noland Co.* v. *Allied Contractors* (supra) is predicated on the *Bregman Construction Corp.* case, decided by Judge Zavatt sitting in the United States District Court for the Eastern District of New York. It is highly significant that the Court of Appeals in our case specifically stated that the principles of the *Bregman* case were not applicable to the instant case and declined to say whether that Court would or would not follow it if the case were on appeal before it. Furthermore, our case had been decided before the Court of Appeals for the Fourth Circuit decided the *Noland* case on December 24, 1959. Yet the Court of Appeals for the Fourth Circuit neither mentioned nor alluded to our case. If the Court of Appeals for the Fourth Circuit felt that there was any conflict it would be logical to

assume that some mention would have been made of our case when the Court went to the length of mentioning the *Bregman* case which was a trial court opinion in the Second Circuit. It is clear that the Court of Appeals for the Fourth Circuit felt that our case was *sui generis* to such an extent that it was not even worth mentioning in its opinion.

Reasons for Denying Application for Writ

1. Petitioner first contends that its application for the writ should be granted because the decision of the Court of Appeals herein is in conflict with the decision of the Court of Appeals, Fourth Circuit, in *Noland* (supra) which expressly relied on Judge Zavatt's decision in the *Bregman* case. Petitioner is completely in error. All that was decided in the *Noland* and *Bregman* cases was that the fact that orders separate in form and not part of a single contract did not serve to invalidate a claim made within 90 days of the last of these items where it had been proven that all the items so delivered were closely related in time. The opinion of he Court of Appeals in our case expressly avoided any indication of what it would do were that question presented to it. the Court stating:

> "Judge Zavatt so ruled in *United States for the use of Edwards* v. *Bregman Construction Corp.*, 172 F. Supp. 517 (E.D. N. Y. 1959) but Judge Watkins held the contrary in *United States to the use of Noland Co.* v. *Allied Contractors*, 171 F. Supp. 569 (D. Md. 1959), which we are advised is now under appeal to the Fourth Circuit. The question here is an easier one. In this case

any rights of Edwards to make claim against Reiss and the surety with respect to the deliveries of August, September and October, 1956, ended on January 29, 1957. From that day forward Reiss could have made payments to Greene free from any liability to Edwards under the Miller Act with respect to all these deliveries. Even if the more liberal view were to be taken in cases such as those decided by Judge Zavatt and Judge Watkins, and we by no means intimate that we would do so, it would be wholly inconsistent with the purpose of the notice provisions of the Miller Act, as explained in our opinion in the *Thompson* case, to hold that a shipment made on March 5, 1957, under an order of February 20, 1957, could revive a Miller Act liability long extinguished and thereby place in jeopardy payments properly made by the contractor to the subcontractor in the interval."

Since the primary basis for the application for the writ is predicated upon alleged conflict between decisions in the different circuits, it is most important to consider whether either of the Courts considered that there was any conflict in their decisions. We have already shown that the Court of Appeals of the Second Circuit held that our case was *sui generis* and that there was no conflict, expressly mentioning both the *Bregman* and *Noland* cases. We must next examine whether either Judge Zavatt in the *Bregman* case or the Court of Appeals for the Fourth Circuit in the *Noland* case considered their decisions in any manner in conflict with the previous decision both at Trial Term and the Court of Appeals in our case. It must be borne in mind that our case originated

in the trial court for the Eastern District of New York, just as did the *Bregman* case. The *Bregman* case was decided sometime after our case was decided by Chief Judge Bruchhausen. It would be just straining one's credulity to believe that Judge Zavatt in the *Bregman* case was not aware of Judge Bruchhausen's prior decision in the same Court. Judge Zavatt obviously felt there was no conflict between his decision and Judge Bruchhausen's decision in our case, otherwise he certainly would have mentioned it. By the same token, if the Court of Appeals for the Fourth Circuit considered that there was any conflict between its opinion and the opinion in our case, it would have made some mention of it; but none was made. Thus the alleged conflict upon which the application for the writ is based is a non-existent one created by the petitioner out of sheer necessity.

2. As its subsidiary reason for granting of the writ petitioner cites a considerable number of cases for the proposition that the decision of the Court below creates an artificial distinction between a materialman making deliveries to a government project under separate orders and a single overall contract. While we have already pointed out that the Court below did not predicate its decision on that point, we must, in view of petitioner's argument, answer it in kind.

At the very outset and in order to show what improper liberties petitioner has taken in its argument, we must refer to its citation of *P. A. Bourquin & Co.* v. *Chester Construction Co.*, 104 F. 2d 648 (2nd Circuit, 1939). In referring to this case petitioner says that the Court of Appeals below in effect did not

follow its own decision in the *Bourquin* case. How that statement could conceivably have been made had petitioner read the *Bourquin* case is just past belief. In the *Bourquin* case the Court of Appeals stated at p. 649.:

> "Bourquin's men left the job on January 28th, having completed all the work required by its subcontract except the furring and lathing for a cornice in the letter box lobby. No detail plan for such cornice construction was furnished until about the middle of April."

It was the aforesaid item of work, specifically part of the original subcontract, that was performed in April and which was sufficient to bring the subcontract balance within the ninety-day period. This is a point which petitioner chooses to completely ignore. It is the essential point of difference between the *Bourquin* case and our case where the last item delivered on March 5 was a completely independent order having nothing to do with the prior deliveries. As a matter of fact, in its very opinion in our case the Court of Appeals said:

> "Our decision in *United States for the use of Bourquin* v. *Chester Construction Co.*, 104 F. 2d 648 (2d Cir. 1939), in no way supports the plaintiff since that case concerned work done under a contract and not under a series of purchase orders."

It might be said that for over twenty years the principles of the *Bourquin* case have been well understood and followed in this jurisdiction.

All other authorities cited by the petitioner are clearly distinguishable.

Apache Powder Co. v. *Ashton Co. Inc.*, 264 F. 2d 417 involved a requirements contract by which a claimant supplied to a subcontractor all the blasting powder necessary for a road construction project. The original subcontractor withdrew and its place was taken, unknown to the claimant, by another corporation which had the same offices and officers. The sole question in the case was whether the amount due from the first, withdrawn, subcontractor was a proper part of the claim against the substituting subcontractor. The notice itself was given in proper form and well within 90 days. Orders were continuous and closely related in time.

Fourt v. *U. S. for use of Westinghouse Electric Supply Co.*, 235 F. 2d 433, involved only the question as to whether the 90 day period could run from date of delivery of materials which were not actually used on the project but rather went to replace inventory items in the subcontractors stock which were so used. Incidentally, all deliveries here were well within 90 days of each other, the entire job period extending only over 6½ months.

In *Moyer* v. *U. S. for use of Trane Co.*, 206 F. 2d 57, the point in issue was not even raised in the District Court, as the Appellate Court said at p. 61, viz.,

> "This contention was not made in the District Court and the evidence with respect to the deliveries was not taken with that point in mind."

There is nothing in the case to show whether the deliveries were the result of separate orders, the dates of such deliveries, nor their relation to each other, as under an original order or contract. What the Court

said in the *Moyer* case was accordingly wholly unnecessary to the decision of that case and constitutes no authority one way or the other.

Glassell-Taylor Co. v. *Magnolia Petroleum Co.*, 153 F. 2d 527, is completely distinguishable. Magnolia Petroleum Co., the use plaintiff, had supplied certain filling station tanks along the routes to and from the construction project site at the instance of one of the general contractor's subcontractors, who was himself involved in excavating and hauling work. Each morning, the trucks would fill up and go about the days business. On the trial, 127 invoices were introduced, covering sales for 127 days. The operation was a continuing one and no more than a day or two elapsed between each "delivery". Notice of claim was given twenty days after the last of the 127 consecutive deliveries of materials.

Cooley v. *Barten & Wood, Inc.*, 249 F. 2d 912, cited by petitioner, far from being in support of its position, vividly points out exactly the reasons why petitioner cannot prevail here. The Court there said:

> "It is essential for the purpose of the notice that it be given within a certain period. Therefore the giving of the notice within the ninety day period is a condition precedent of the plaintiff's right of action under the Miller Act. The reason for setting a time limit, such as this ninety day period, on the sending of notice to the principal contractor was made clear in *Bowden* v. *United States*, 9 Cir., 1956, 239 F. 2d 572, 577, 578, cert. den. *United States ex rel Malloy* v. *Bowden*, 1957, 353 U. S. 957, where it was stated: '* * * *It was the intent of Congress to fix a time limit*

after which the prime contractor could make payment to the subcontractor with certainty that he would not thereafter be faced by claims of those who had supplied labor and materials to the subcontractor. * * * A brief letter from the supplier to the prime contractor will make certain and unambiguous the rights and liabilities of all concerned—the supplier, the prime contractor and the surety. *We do not believe that Congress intended to have it held that such little expenditure of effort is too much diligence to require of a supplier in order that he may secure his right of action on the payment bond.*" (Emphasis added.)

The Court there concluded by holding most emphatically against, not for, the claimant-materialman.

American Bridge Co. v. *Honstain,* 120 Minn. 329 (1908) simply construed Minnesota lien law as it then stood. In a much more recent and more apposite case, *Guy T. Bisbee* v. *Granite City Investing Corp.,* 159 Minn. 442, the court said, "A materialman who has completed his contract cannot extend the time for filing a lien by thereafter furnishing additional material for the mere purpose of continuing or reviving the lien." And in *Kahle* v. *McClary,* 255 Minn. 239 it was held that no revival of a mechanic's lien will be allowed when deminimus operations are performed for the sole purpose of extending the time for the lien.

Union Trust Co v. *Casserly,* 127 Mich. 183 (1901) gives only a general construction of the Michigan lien law, and sets out no schedules of deliveries whatsoever. It is impossible to tell from the decision, as

reported, what time periods elapsed between deliveries. Examination of other Michigan cases reveals that when faced with a factual situation actually analogous to the one here present, the Michigan courts take the same position as the Court of Appeals herein. See, e.g., *Hubbard* v. *Finch*, 262 Mich. 506.

Sandusky Grain Co. v. *Borden's Condensed Milk*, 214 Mich. 306, next cited by petitioner, contains no statement of the type, value or dates of delivery of the materials furnished and there is no way of telling, from the opinion as reported what the issue really was in this regard.

Milliken Bros. Inc. v. *City of N. Y.*, 201 N. Y. 65, is totally inapplicable. The only question here was whether the 30 day period in which a claimant had to file a notice of lien on a public improvement ran from "substantial" completion of the project or "actual" completion.

Chambers v. *George Vassar's Sons & Co.*, 81 Misc. 562 (N. Y.) merely construes the then N. Y. lien law relating to "last items" and has nothing whatever to do with the present situation.

There do, however, exist many state cases which petitioner has neglected to mention, all of which deal with factual situations closely analogous to the instant case, and which hold quite firmly that where separate independent orders are involved and there also occurs a considerable time gap between the bulk of the items delivered and an alleged "last item", claimant cannot recover.

In *Fitzpatrick* v. *Ernst*, 102 Minn. 195, there was no entire contract and separate bills were rendered

and paid on each item supplied. The Court held that the time period for filing liens ran from each item, not the alleged last of the group.

In *Hensel* v. *Johnson*, 94 Md. 729, the contract was for specified quantities of lumber at fixed prices, which were delivered periodically on order with no over-riding contract. The Court held that where a substantial time period had elapsed between the main group and the "last item" no recovery could be had except for that last item itself.

In *Lane & B. Co.* v. *Jones*, 79 Ala. 156, the Court concluded that where separate and distinct orders were involved and were widely spaced in time, recovery could be had only for the last item and not for those other items which had preceded it by a considerable length of time.

3. Under item "3" of Petitioner's "Reasons" (pp. 13-14), yet another non-sequitur is introduced. The recent amendment to the Miller Act, Pub. Law 86-135, which provides that the time period during which the claimant must commence action now runs from the date on which the "last of labor was performed or material was supplied by him", if anything, limits the claimant and repuires of him more, rather than less diligence, inasmuch as the date of final settlement invariably comes well after the date of last furnishing of labor and materials. In any event, the 90 day notice must precede the institution of the suit as a first prerequisite and as the two periods now run from the same date it is hard to see how a claimant could be prejudiced in any way.

4. Finally, and despite this Court's rejection of an application for a writ of certiorari in the *Bowden*

case (supra), petitioner again contends that the letter from the subcontractor, dated January 9, 1957, to the general contractor herein was sufficient notice of claim under the Miller Act. And again we are faced with the lamentably time-consuming task of showing that petitioner's impressive looking string of citations has nothing whatsoever to do with the question. We will refer to them but briefly. *McWaters & Bartlett* v. *U. S.*, 272 F. 2d 291, involved an itemized statement exhibited by the claimant to the general contractor during a conference which was held to be sufficient notice. *Coffee* v. *U. S.*, 157 F. 2d 968, similarly involved exhibition by the claimant himself of an itemized statement of claim and a discussion of it with the general contractor. *U. S. f/u/b Hopper Bros.* v. *Peerless Casualty Co.*, 255 F. 2d 137, simply held that a misplaced decimal point did not invalidate an otherwise proper notice sent by the claimant to the general contractor. *U. S. f/u/b Birmingham Slag* v. *Perry*, 115 F. 2d 724, held that ordinary mail in lieu of registered mail is sufficient where the notice is actually received, as did *Fleischer* v. *U. S. f/u/b Hallenbeck*, 311 U. S. 15. *Houston Fire & Casualty Co.* v. *U. S. f/u/b Trane Co.*, 217 F. 2d 727, held that oral notice by the claimant together with a written acknowledgment thereof by the general contractor was sufficient.

In not one of the cases cited by petitioner was the "notice" delivered by one other than the claimant himself. These cases were rejected as authority for petitioner's position not only by both courts below in this case, but by both District and Appellate courts in *U. S. f/u/b J. A. Edwards & Co., Inc.* v. *The Thompson Construction Corp., et al.*, 273 F. 2d 873, where the same group of cases was put forward in support

of the same proposition. Application for a writ has also been made to this court in the Thompson case.

Conclusion

It cannot be overemphasized that the instant case is *sui generis*, presenting as it does a state of facts wholly apart from any to be found in the cases with which petitioner alleges it to be in conflict. Nowhere else is a hiatus of over four months found between all deliveries by a materialman and a subsequent unconnected, financially insignificant "last item". If this $15 item was absent the petitioner's rights under the Miller Act expired on February 1, 1957 without question. The Court of Appeals simply held that an item of $15 delivered during the subsequent month of March could not revive the petitioners' lapsed rights. There must be a reasonable cut-off date. It was not asking too much for the petitioner to file notice of non-payment within 90 days of October 31, 1956 when there was no further business during that time. It would be dangerous doctrine to permit revival of rights by a subsequent delivery. Where would the limit be, a lapse of 6 months, 1 year after a claimant's rights lapsed? It is respectfully submitted that this case is clearly *sui generis* and involves no conflict of general principles which require review by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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